

State of Colorado



Bill Owens
Governor

John Zakhem
Board Chair

Kristin F. Rozansky
Board Director

State Personnel Board
633 17th Street, Suite 1320
Denver, Colorado 80202-3604
Phone (303) 866-3300
Fax (303) 866-5038

AGENDA PUBLIC BOARD MEETING November 21, 2006

A public meeting of the State Personnel Board will be held on **Tuesday, November 21, 2006, at the Colorado Department of Public Safety, Colorado State Patrol Academy, 15055 South Golden Road, Golden, Colorado 80401.** The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by November 16, 2006.

I. REQUESTS FOR RESIDENCY WAIVERS

A. November 1, 2006 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

There are no pending Matters before the Board on review this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES ON APPEAL TO THE STATE PERSONNEL BOARD

A. Lynn Redden & William Kaberlein v. Department of Labor & Employment, Unemployment Insurance and Department of Personnel and Administration, State Personnel Board case number 2005G094(C).

Complainants appealed the selection process utilized by Respondent for filling multiple vacancies for the Labor and Employment Specialist III (L & E III) position, seeking an order invalidating the promotions (with the exception of the number 3 ranked candidate) and mandating that Respondent conduct the selection process again, in accordance with the Rule of Three as set forth in the Colorado Constitution, article XII, §13(5), and C.R.S. §24-50-112.5(b)(2). After hearing, the Administrative Law Judge (ALJ) concluded that Respondent violated the Colorado Constitution, article XII, §13(5), and §24-50-112.5(2)(b), C.R.S.; Respondent violated former Director's Procedure P-4-17; and Respondent's action was arbitrary and capricious. Rescinding Respondent's actions, the ALJ ordered that Respondent shall invalidate the promotions of the nine individuals promoted to L & E III (with the exception of the promotion of the candidate who ranked #3); Respondent shall make the remaining selections to the L & E III positions from the January 2005 referral list based on the three highest ranking for each position; the first selection shall be made from the top three ranked individuals on the referral list (#1, #2,

and #4); and for each additional selection, the next highest ranking individual's name (#5) will be referred to the appointing authority, until all selections have been made.

On July 6, 2006, the ALJ issued the Initial Decision of the Administrative Law Judge.

Pre and Post ID Procedural History: On November 10, 2005, the Department of Personnel and Administration's Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene was filed. On December 7, 2005, the ALJ issued her Consolidation Order: Procedural Order Regarding Motion to Intervene. On March 8, 2006, the Department of Personnel and Administration's Status Report and Renewed Motion to Dismiss the Department of Personnel and Administration was filed. On March 21, 2006, the ALJ issued her Order Granting Renewed Motion to Dismiss Department of Personnel and Administration as a Party. Following the filing of a notice of appeal of the ALJ's Initial Decision by Respondent on August 4, 2006, the Department of Personnel and Administration, on October 16, 2006, filed its Motion for Leave to File Brief of Amicus Curiae Department of Personnel and Administration and Brief of Amicus Curiae Department of Personnel and Administration. Respondent's Brief on Appeal was also filed on October 16, 2006. On October 23, 2006, Complainants filed Complainants' Objection to Department of Personnel's Motion for Leave to File Brief of Amicus Curiae. On October 30, 2006, Complainants filed Complainants' Request for Oral Argument and Complainants' Answer Brief on Appeal. On November 2, 2006, Complainants filed Complainants' Answer Brief in Response to Department of Personnel's Amicus Curiae Brief. On November 6, 2006, Respondent's Reply to Complainants' Answer Brief was filed.

- B. Patrick Ward v. Department of Natural Resources, State Personnel Board case number 2004B143 (February 2, 2006) (July 20, 2006 - Initial Decision of the Administrative Law Judge, on Remand).

Following Board review of the Initial Decision of the Administrative Law Judge, the Board remanded this case to the ALJ "solely for legal analysis regarding the fifth prong of the test for a *prima facie* case of discrimination based on a disability, as enunciated in *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998)." On remand, the ALJ made additional findings, including the fact that the preponderance of evidence demonstrates that despite Complainant's request for reasonable accommodation by transfer to a vacant position, Respondent continued to seek applicants other than Complainant, for any and all vacant positions for which he was qualified. The ALJ determined that the agency had a policy requiring it to conduct the vacant job search, the employee requested transfer to a vacant position, the agency failed to conduct that job search in violation of its own policy, and the agency failed to consider that employee for any and all vacant positions that came open. Contrary to Respondent's argument, the ALJ reasoned that to require Complainant to perform a vacant job search, excusing Respondent from compliance with his own policy, in order to meet his *prima facie* case, would shift the burden of proving the affirmative defense of undue hardship away from Respondent and onto Complainant. Finally, the ALJ concluded that, despite Complainant's request for transfer to a vacant position, Respondent, in violation of its own policy, failed to consider Complainant as a candidate for any and all vacant positions in the 1500-employee statewide agency, for a period of over five months. The ALJ thus found that Complainant met the fifth prong of the *prima facie* case for a failure to accommodate claim under *Fail*.

Post ID Procedural History: On October 18, 2006, Respondent's Opening Brief on Appeal from the Initial Decision of Administrative Law Judge: On Remand was filed. Complainant filed Ward's Answer Brief on Appeal from the ALJ's Initial Decision on Remand on October 30, 2006. On November 6, 2006, Respondent's Reply Brief on Appeal from the Initial Decision of Administrative Law Judge: On Remand was filed.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES TO GRANT OR DENY PETITIONS FOR HEARING

- A. Larry Steve Martinez v. Department of Human Services, Division of Youth Corrections, Lookout Mountain Youth Service Center, State Personnel Board case number 2006G055.

Complainant, a Safety and Security Officer (SSO) I, for the Department of Human Services, Division of Youth Corrections, at Lookout Mountain Youth Services Center, argues that he was unfairly terminated during his probationary period due to discrimination based on national origin or ancestry, a similarly situated white male was treated differently, Complainant was given corrective actions which were backdated by two months and compiled into one letter, and excessive force was used to escort him off the premises.

Respondent counters that, as a probationary employee who was terminated due to unsatisfactory performance, Complainant is not entitled to a hearing, Complainant was not discriminated against on the basis of his national origin or ancestry, and Complainant's reallocation from SSO Intern to SSOI was not effective until he was appointed to the position.

On November 8, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainant's petition for hearing be denied.

- B. Diane Luck v. Department of Public Health and Environment, Laboratory Services Division, State Personnel Board case number 2007G014.

Complainant was employed as a probationary Certification Program Manager in Laboratory Services Division (LSD) for the Colorado Department of Public Health and Environment (CDPHE) from November 1, 2005, until her termination on August 4, 2006. Complainant filed a petition for hearing on August 14, 2006, arguing that her termination was arbitrary, capricious or contrary to rule or law because her termination was based on conditions (such as poor morale) present in the laboratory prior to her employment, character defamation, and false and unsubstantiated claims of feedback from customers. It is Complainant's belief that the decision to terminate her was based on her findings of substandard procedures and practices in the CDPHE toxicology section which David A. Butcher directs, which constitutes a violation of the Whistleblower Act. Complainant requests as relief: (1) written apologies from David A. Butcher and Carol Anderson for defaming Complainant and making inaccurate statements of Complainant's scientific and interpersonal skills; (2) an investigation of the poor morale because of lack of leadership in the LSD; and (3) an investigation into the lack of appropriate education, training, and leadership skills of the laboratory director to serve as a toxicology laboratory director and leader of the CDPHE public health laboratory.

Respondent argues that during Complainant's probationary period, she exhibited poor supervision leading to poor staff morale, she subjected her subordinates to disrespectful treatment, she had poor peer relationships resulting in conflicts, she caused customer complaints and was unable to accept feedback and change her behavior. Respondent further argues that Complainant's appeal is moot because she because the relief Complainant seeks, if granted, would have no practical legal effect. Additionally, Respondent argues that Complainant's appeal does not present issues that fall within the Board's jurisdiction because Complainant provides no argument in her information sheet in support of a Whistleblower Claim. Respondent also argues that Complainant's allegations do not fall within the Whistleblower Act. Finally, Respondent argues that termination of a probationary employee for performance issues does not constitute a basis for granting a discretionary hearing.

On November 8, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainant's petition for hearing be denied.

C. Jeff Anthony v. Department of Revenue, Division of Motor Vehicle, Drivers License Administration, State Personnel Board case number 2007G006.

Complainant, a probationary employee at the time of termination was employed with Department of Revenue, Division of License Administration, claims that Respondent's terminated him because he disclosed information about the Northglenn Driver License Office to appropriate persons regarding abuse of authority, mismanagement, threats, inappropriate fines, retaliation and inadequate training. Complainant alleges discrimination based on age, race/color/creed and sex.

Respondent counters that Complainant is not entitled to a hearing as a probationary employee who was terminated for unsatisfactory performance, which is not reviewable by the Board and that the termination of Complainant's employment was not retaliatory or discriminatory.

On November 9, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainant's petition for hearing be denied.

D. Wendy Pierzina, Anthony Wilk & Yvonne Jiron v. Regents of the University of Colorado, University of Boulder, Wardenburg Health Center, State Personnel Board case number 2007G009(C).

Complainants are certified employees assigned to the Health Information Management department at Wardenburg Health Center. Complainants managed medical records for Wardenburg. The department was split so that Health Information Management could continue to work with paper medical records and a new department. Electronic Content Management was created to begin processing electronic medical records. The supervisor of the new department hired temporary workers to staff the department. Complainants were advised that they would not be able to transfer into the new department, even though the Health Information Management department staffing was expected to be reduced once the paper medical records become obsolete at Wardenburg.

Complainants request that the Health Information Management staff be given first opportunity to fill positions in the Electronic Content Management department if those became permanent or if there are reductions in staffing in the Health Information Management department. Complainants request that the Electronic Content Management be merged back into Electronic Content Management or managed by someone with Registered Health Information Administrator credentials and that the health management be adequately staffed to perform tasks and with all related software working properly and that there be assurances by the Wardenburg Director that there will be no punitive actions taken against the Complainants.

Respondent argues that the Complainants' grievance issues do not relate to a violation of "employee's rights under the federal or state constitution, part 4 or article 34 of this title, article 50.5 of this title or the grievance procedures adopted pursuant to subsection (1) of the section," C.R.S. 24-50-123 (3) and therefore the Board is without jurisdiction to grant Complainants' petition. Respondent argues that Board Rule 8-46 is infirm because it does not reflect the limitations on Board jurisdiction found in C.R.S. 24-50-123(3) and that the relief sought by Complainants' would violate the prerogatives of the management of the Wardenburg Health Center and therefore, the relief requested is outside the purview of the Board's authority to grant.

Respondent argues that if a hearing is granted; Respondent would be prepared to argue that the decisions denying Complainants' grievances, were not arbitrary or capricious.

Complainants' grievance issues "concerning places for reorganization or layoffs, or which allege violations of the Board rules for reorganization, layoffs and retention rights" have been dismissed from the case without prejudice. The Administrative Law Judge found that certain claims relating to the anticipated reorganization were not ripe for review. The dismissal of premature claims leaves several grievance issues related to the interactions of the staff during the creation of the Electronic Content Management department.

On November 9, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainants' petition for hearing be denied.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES

- A. Ronald Quintana v. Department of Transportation, State Personnel Board case number 2006B046 (October 12, 2006).

Complainant, a Labor Trades and Crafts supervisor, appealed his thirty-day suspension by Respondent, seeking removal of the disciplinary action from his file, restoration of all back pay and benefits, and no further retaliation or discrimination against him. After hearing, the ALJ found that Complainant had received nude photos at his work e-mail, that the photos were offensive, inappropriate, objectionable, obscene and of a prurient nature, and that he sent the photos to one of his subordinates using Respondent's e-mail system. Affirming Respondent's disciplinary action, the ALJ determined that the decision to impose discipline for violations of both the computer and sexual harassment policies was not arbitrary, capricious, or contrary to rule or law; Complainant did not prove that his discipline was the product of unlawful discrimination; Complainant's discipline is not contrary to Board Rule 6-2; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

- B. Norma Jean Maggard v. Department of Human Services, Colorado State Veterans Home at Fitzsimons, State Personnel Board case number 2006B058 (October 23, 2006).

Complainant, a certified nursing assistant, appealed her termination by Respondent, seeking reinstatement, back pay, and an award of attorney fees and costs with interest. After hearing, the ALJ found that Respondent's case for terminating Complainant's employment was built upon a series of events taking place during three days at the end of November and early December 2005; however, not all of the allegations about those events were supported by credible and persuasive evidence at hearing. There was persuasive evidence that Complainant had failed to complete the fourth class of the anger management course that she was required to take pursuant to her August 24, 2005 corrective action, that she had failed to talk with anyone about not attending the full class, that she was rude and loud during a discussion with the facility scheduler on one date, and that she told a supervisor that she was "sick of this shit" after being informed that she was being placed on administrative leave. The ALJ concluded that Complainant committed only some of the acts for which she was disciplined; Respondent's action in disciplining Complainant was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was not within the range of reasonable alternatives; and attorney fees are not warranted. The ALJ ordered that Complainant is reinstated with full back pay and benefits, except that the amount of back pay is to be calculated as if Complainant had served a 30-day suspension without pay.

- C. Rudolph Salazar v. Colorado State University at Pueblo, State Personnel Board case number 2006B053 (October 24, 2006).

Complainant, a custodian, appealed his administrative termination by Respondent, alleging discrimination based on disability, age, race, and national origin, and seeking reinstatement. After hearing, the ALJ found that Respondent's failure to obtain accurate, objective, and reliable information about Complainant's ability to perform the essential functions of his position, prior to making a decision to terminate Complainant's employment, was arbitrary and capricious. Reinstating Complainant with full back pay and benefits, the ALJ concluded that Respondent did not discriminate against Complainant on the basis of disability, race, or national origin, but did discriminate against him on the basis of age.

- D. John Applegate v. Department of Personnel & Administration, State Personnel Board case number 2006B107 (November 2, 2006).

Complainant appealed his disciplinary demotion by Respondent to a Structural Trades I, seeking rescission of the demotion and reinstatement to his position as a Structural Trades II. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined. The ALJ found that following the October 2005 flood causing over half a million dollars in damage, Complainant was directed to follow the new procedure, which required that he isolate the floor prior to making a repair in a bathroom. The ALJ further found that, on April 10, 2006, fully aware of the potential disaster that could result from violating this procedure, Complainant knowingly and intentionally failed to follow the procedure, which resulted in significant flooding damage and the necessity of replacing all of the computer servers in the building. Affirming the disciplinary demotion, the ALJ concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives.

VI. REVIEW OF THE MINUTES FROM THE OCTOBER 17, 2006 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS OCTOBER 17, 2006 PUBLIC MEETING:

- A. Timothy Bennett v. Department of Corrections, State Personnel Board case number 2003B150(C).

The Board reviewed and considered the Findings of Fact of the Amended Initial Decision, as modified by the Order Re: Proposed Modifications or Clarifications of Amended Initial Decision of the Administrative Law Judge, and the Conclusions of Law of the Amended Initial Decision, and adopted both the Findings of Fact and Conclusions of Law. The remedy awarded to Complainant, with regards to the abolishment of his position, as set forth in the Order Re: Proposed Modifications or Clarifications of Amended Initial Decision of the Administrative Law Judge, paragraph 4, was adopted.

The Board remanded the matter to the Administrative Law Judge to hold an evidentiary hearing on two issues. The first issue is the amount of attorney fees to be awarded to Complainant for litigating the abolishment of his position. The second issue is the appropriate amount of pay reduction in Complainant's base pay imposed as a result of the August 8, 2003 disciplinary action. The Board voted to reject the Administrative Law Judge's modification of the Respondent's impositions of a permanent monthly \$300 reduction of Complainant's base salary. The Board determined that the reduction of \$1800 total over a six-month period is not sufficient, given the record before the Board.

The Board found that the permanent reduction on Complainant's base pay as imposed by Respondent was excessive, given the record before the Board. The Administrative Law Judge is to make a written finding of facts and enter an order regarding the monetary

award as to the two issues outlined. The Board order is not final agency action by the Board, as the issues above have not yet been determined by the Board. *Colorado State Personnel Board v. Department of Corrections*, 988 P.2d 1147 (Colo. 1999).

- B. Sharon Carbaugh v. Board of Trustees for the University of Northern Colorado, State Personnel Board case number 2007G008.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- C. James Thomas v. Department of Human Services, Disability Determination Services, State Personnel Board case number 2006G007.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Budget Report and Operating Expense Report
- Cases on Appeal to the Board and to Appellate Courts
- Order Affirmed in Michael, Henderson, Kohli, Mitchell, Orndoff, Suazo, Williams, Davis, Knopp, Bustamante, Mondragon, Smith & Tygart v. Department of Labor & Employment, Office of Unemployment, State Personnel Board case No. 2004G095, Court of Appeals Case No. 05CA0297
- Web Site Statistics: July 2006 - 110,937; August - 100,176; September 2006 - 93,282

B. OTHER BOARD BUSINESS

- Staff Activities

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

XI. EXECUTIVE SESSION

A. Case Status Report

B. Minutes of the October 17, 2006 Executive Session

C. Other Business

XII. WORKING SESSION

- Business Plan

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

December 19, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
January 16, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
February 20, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
March 20, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
April 17, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
May 15, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
June 19, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604